Kasi s/o Arunachalam Chettiar v AR Kaveri Achi

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-79 OF 1997
NH CHAN, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
24 APRIL 1998

Land Law *— Restraints on dealings — Caveats — Application for removal of caveat — Caveats entered against estate on behalf of beneficiaries on the ground that testator had died intestate — Testator's will was declared valid by foreign court — Whether matter was res judicata — Whether failure to have the will invalidated renders the caveats ineffectual — Whether caveats ought to be set aside*

Land Law *— Restraints on dealings — Caveats — Caveatable interest — Caveats entered against estate by an agent for persons claiming to be beneficiaries of estate — Caveator alleged that the will was invalid despite ruling by a foreign court that the will was valid — Caveator had no interest in the will — Whether caveator had shown that he has interest which could be protected by the caveats — Whether it is for each of the beneficiaries to file own caveat*

On 12 June 1964, one Chidambaram Chettiar ('Chettiar') executed a will in India. Chettiar had two wives, Meenakshi Achi and Alagammai Achi. Meenakshi Achi passed away in 1947 and she was survived by her daughter Meenakshi. This Meenakshi married Ramasamy, and she had four children with him. Chettiar passed away in 1968 after having appointed Alagammai as his executrix and bequeathed his entire estate, except RS7,000, to Alagammai. Alagammai in turn executed her will on 12 April 1982 and appointed the respondent, Kaveri Achi as her executrix. Meenakshi died in 1984 followed by Alagammai in 1985. Two caveats were entered in respect of Alagammai's estate by the appellant. The first caveat was entered by the appellant acting as agent of Ramasamy, stated to be the lawful beneficiary of Meenakshi's estate. The second caveat was entered as agent for the issues of Meenakshi and Ramasamy and grandchildren of Chettiar. The appellant stated that the four persons he represented were the beneficiaries to the movable property of Alagammai if she had died intestate.

The court in India decreed that Chettiar's will in favour of Alagammai was valid and binding. Similarly, the validity of Alagammai's will had been challenged and was held by the Indian court to be valid. The respondent applied for the dismissal of the two caveats. The judicial commissioner allowed the application of the respondent to set aside the first and second caveats entered by the appellant. The appellant appealed.

Held, dismissing the appeal:

In the absence of any other application to set aside the decree given in India, the proper approach to be adopted was that the matter was res judicata and the parties were estopped from challenging the validity of Chettiar's will. The failure of the appellant to have the will invalidated, the object of which the first caveat was lodged, rendered the caveat ineffectual. This was further enforced by the fact that the matter of the validity had been concluded by the Indian High Court decision that the will was decreed to be valid. There was no stay and it had to be construed as valid and binding until the contrary was shown. There was also no declaration by any Malaysian court that Chettiar's will was invalid.

The caveators' names must be entered in Form 173 as the persons having interest to be protected even though the form is signed by his solicitor if he or she is so represented. Under s 33 of the Probate and Administration Act 1959, the caveator must be a person with interest. It could not be shown from where the appellant, the caveator, derived his interest which could be protected by the caveats. The caveator therefore had no locus standi by reason of his having no interest in the will which the caveat sought to protect for the caveator to sustain. As regards the interest of the four grandchildren of Chettiar, it was for each of them to have filed a caveat as having any interest, if any. Prolonging litigation also had the undesirable effect of preventing the successful party from extracting the grant of probate especially so when there was no reasonable basis to question the validity of both Chettiar's and Alagammai's wills. Therefore, the application to set aside the first and second caveats should be allowed (see pp 755G–H, 756B–E, G–I and 757A–C).

[Bahasa Malaysia summary

Pada 12 Jun 1964, seorang yang bernama Chidambaram Chettiar ('Chettiar') telah menyempurnakan satu wasiat di India. Chettiar mempunyai dua orang isteri, Meenakshi Achi dan Alagammai Achi. Meenakshi Achi telah meninggal dunia pada tahun 1947 dan meninggalkan seorang anak perempuan, Meenakshi. Meenakshi ini telah berkahwin dengan Ramasamy dan telah melahirkan empat orang anak. Chettiar telah meninggal dunia pada tahun 1968 selepas melantik Alagammai sebagai wasi beliau dan mewariskan keseluruhan harta pusakanya, kecuali RS7,000 kepada Alagammai. Alagammai sebaliknya telah menyempurnakan wasiat beliau pada 12 April 1982 dan melantik penentang, Kaveri Achi sebagai wasinya. Meenakshi telah meninggal dunia pada tahun 1984 yang diikuti oleh Alagammai dalam tahun 1985. Dua kaveat telah dimasukkan berhubung dengan harta pusaka Alagammai oleh perayu. Kaveat pertama telah dimasukkan oleh perayu yang bertindak sebagai ejen Ramasamy, yang dikatakan sebagai benefisiari sah di sisi undang-undang bagi harta pusaka Meenakshi. Kaveat kedua telah dimasukkan sebagai

ejen bagi isu-isu Meenakshi dan Ramasamy serta cucu Chettiar. Perayu menyatakan bahawa keempat-empat orang yang beliau wakili merupakan benefisiari-benefisiari kepada harta boleh alih Alagammai jika beliau telah meninggal dunia tanpa berwasiat.

Mahkamah di India telah mengisytiharkan bahawa wasiat Chettiar yang memihak kepada Alagammai adalah sah dan mengikat. Begitu juga, keesahan wasiat Alagammai telah dicabar dan diputuskan oleh Mahkamah India sebagai sah. Penentang telah memohon untuk penolakan akan kedua-dua kaveat tersebut. Pesuruhjaya kehakiman telah membenarkan permohonan penentang tersebut untuk mengetepikan kaveat-kaveat pertama dan kedua itu yang telah dimasukkan oleh perayu. Perayu telah merayu.

Diputuskan, menolak rayuan:

Dalam ketiadaan mana-mana permohonan lain untuk mengetepikan dekri yang telah diberikan di India, pendekatan yang wajar untuk diterima pakai adalah bahawa perkara tersebut adalah res judicata dan pihak-pihak yang berkenaan diestop daripada mencabar keesahan wasiat Chettiar. Kegagalan perayu untuk mentaksahkan wasiat tersebut, di atas tujuan yang mana kaveat pertama telah dimasukkan, menjadikan kaveat tersebut tidak berkesan. Ini diperkukuhkan selanjutnya oleh fakta bahawa perkara berhubung keesahan telah diputuskan oleh keputusan Mahkamah Tinggi India bahawa wasiat tersebut telah didekrikan sebagai sah. Tidak terdapat penggantungan dan ia telah ditafsirkan sebagai sah dan mengikat sehingga ditunjukkan sebaliknya. Tidak juga terdapat apa-apa perisytiharan oleh mana-mana mahkamah Malaysia bahawa wasiat Chettiar adalah tak sah.

Nama-nama pengkaveat mesti dimasukkan dalam Borang 173 sebagai orang-orang yang mempunyai kepentingan untuk dilindungi walaupun borang tersebut telah ditandatangani oleh peguamcaranya jika ia diwakili sedemikian. Di bawah s 33 Akta Probet dan Pentadbiran 1959, pengkaveat mestilah merupakan seseorang yang berkepentingan. Ia tidak dapat ditunjukkan daripada mana perayu, pengkaveat, memperolehi kepentingannya yang boleh dilindungi oleh kaveat-kaveat tersebut. Pengkaveat dengan itu tidak mempunyai locus standi kerana beliau tidak mempunyai kepentingan dalam wasiat tersebut di mana kaveat yang cuba melindungi pengkaveat tersebut boleh dikekalkan. Berhubung kepentingan keempat-empat cucu Chettiar, ia adalah terpulang pada setiap seorang dari mereka untuk memfailkan satu kaveat atas alasan mempunyai sebarang kepentingan, jika ada. Melengahkan litigasi juga mempunyai kesan yang tidak diingini bagi menghalang pihak yang berjaya daripada mencabut geran probet khasnya apabila tidak terdapat asas yang wajar untuk mempersoalkan keesahan kedua-dua wasiat Chettiar dan Alagammai. Dengan itu, permohonan untuk mengetepikan kaveat-kaveat pertama dan kedua tersebut seharusnya dibenarkan (lihat ms 755G–H, 756B–E, G–I dan 757A–C).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419.

Legislation referred to

Probate and Administration Act 1959 s 33
Rules of the High Court 1980 O 18 r 19, O 71 r 37(3)

Appeal from: Probate Petition No S5–45–241 of 1987 (High Court, Kuala Lumpur)

Salleh Abas (*Kerpal Singh* with him) (*U Harcharan & Kerpal*) for the appellant.

Lorraine Cheah (*Shanti Mogan* with her) (*Shearn Delamore & Co*) for the respondent.

Abu Mansor JCA (delivering judgment of the court): This is an appeal by the appellant/caveator against the judgment of the learned judicial commissioner given on 17 February 1997 allowing the application of the respondent/petitioner to set aside the first and second caveats entered by the appellant.

The facts of this case are as follows. On 12 June 1964, one Chidambaram Chettiar ('Chettiar') executed a will in India ('the first will'). We are not directly concerned with this first will. Chettiar had two wives, Meenakshi Achi ('the senior wife') and Alagammai Achi ('the junior wife').

Meenakshi Achi passed away in 1947 and she was survived by her daughter Meenakshi. This Meenakshi married Ramasamy, and with him she had four children. They are Veerappan, Umayal, Valliamai and Meenakshi.

Chettiar passed away in 1968 after having appointed Alagammai as his executrix and bequeathed his entire estate, except RS7,000, to Alagammai.

Alagammai in turn executed her will on 12 April 1982 and appointed her sister Kaveri Achi ('Kaveri') as her executrix. Alagammai bequeathed her entire estate to Kaveri on condition that Kaveri adopt a boy and maintain him until majority after which he is to be married to Alagammai's niece. At the same time after majority, half of the estate was to be given to the adopted son and the balance for Kaveri's benefit.

The next event having a bearing on this property was in 1984 when Meenakshi died followed by Alagammai in 1985.

In respect of Alagammai's estate, two caveats had been entered. We refer now to the first caveat entered by the respondent Kasi ('the first caveator'), the appellant herein, who is acting as agent of Ramasamy who, is stated to be the lawful beneficiary of Meenakshi's estate.

A point worth noting at once is that Chettiar had left a will in which he bequeathed almost his entire estate to Alagammai. It therefore would mean that interest in the first caveat could only be sustained by Meenakshi, as the daughter of Chettiar, in the event that the Chettiar's will is declared invalid.

Kasi also filed a second caveat. This time he was acting as agent for alleged beneficiaries as follows:

(1) Veerappan;
(2) Umayal;
(3) Valliamai; and
(4) Meenakshi

who are the issues of Meenakshi and Ramasamy and grandchildren of Chettiar. The caveator Kasi stated that the four persons he represented are the beneficiaries to the movable property of Alagammai (deceased) if she had died intestate.

We think it is correct to say that the application to apply for the dismissal of the two caveats filed by the caveator Kasi must depend on whether Meenakshi has any interest in her grandfather's estate under Chettiar's will. That in turn provokes the question whether Chettiar's will which virtually excluded her is valid and binding.

The caveator Kasi submitted that Chettiar's will is invalid because he say(s) there exists a procedural defect and testamentary incapacity. In any case, the caveator Kasi argued that the Indian court's decree that the Chettiar's will is invalid could not be overcome by a memorandum of compromise executed between Alagammai and Meenakshi.

The respondent's answer to this submission was that the question of the validity of the will is now for the time being settled in India by the memorandum of compromise and the fact is recorded in the Indian court that Meenakshi acknowledged and confirmed that the will executed by Chettiar in favour of Alagammai is true, valid and binding.

We are in agreement with the view taken by the lower court that, in the absence of any other application to set aside the decree given in India, the proper approach to be adopted is that the matter is res judicata and parties are estopped from challenging the validity of Chettiar's will. We agree with the approach of the learned judicial commissioner. On this ground alone, we feel the petition should succeed.

After the filing of the first caveat, Kasi, the appellant/caveator, filed a civil suit to declare Chettiar's will invalid. In lodging the second caveat, the caveator Kasi described his interest as that of Meenakshi's interest. If we may remember, Meenakshi was Ramasamy's wife and the daughter of Chettiar. Since the will in favour of Alagammai is true and valid as referred to above, this is the end of this submission.

The writ, however, was met by the application of Kaveri Achi, the petitioner who applied under O 18 r 19 of the Rules of the High Court 1980 ('the RHC') to have the suit struck off. That application succeeded and in an appeal, the petitioner was again successful in having the appeal dismissed before the judge in chambers. A certificate of no further argument was subsequently issued and no further appeal was lodged.

It is correct to say that the failure of the caveator Kasi to have the will invalidated, the object of which the first caveat was lodged, renders the caveat ineffectual. This position is further enforced as referred to above by the fact that the matter of the validity has been concluded by the Madras High Court decision that the will was decreed to be valid and therefore res judicata.

We now turn to the second caveat. In discussing this caveat, we have to go back to Alagammai's will since the interest it seeks to protect hinges on Alagammai's estate.

A point to notice is that the validity of Alagammai's will was challenged twice in two levels of the Indian court and was held by that court to be valid. No doubt there is an appeal but the position we have to take is that there is no stay and it has to be construed as valid and binding until the contrary is shown. As far as the adoption provision went, the Indian judge held it was not a condition precedent to render the will invalid and unenforceable.

The learned judicial commissioner also examined the locus standi of the caveator Kasi. Did the caveator Kasi have locus standi? She had present in her mind, and quite properly so, O 71 r 37(3) of the RHC which states:

> Any person who wishes to enter a caveat (in this rule called 'the caveator') may do so by filing the caveat Form 173 in the Registry and obtaining an acknowledgement of entry from the proper officer, or by sending through the post at his own risk the caveat to the Registry.

In her judgment, the learned judicial commissioner correctly addressed her mind that in Form 173 it is the caveator or his solicitor who must sign the form. There is no provision for an attorney to sign the form. What is equally material is that the caveators' names must be entered as the persons having interest to be protected even though the form is signed by his solicitor if he or she is so represented. Under s 33 of the Probate and Administration Act 1959, the caveator must be a person with interest.

For this reason, we are with the learned judicial commissioner when she held that she could not see where Kasi, the caveator, derives his interest which could be protected by the caveats. We also agree with her conclusion that the caveator and plaintiff in suit No S6–22–318–88 has no locus standi by reason of his having no interest in the will which the caveat sought to protect for the caveator to sustain.

This is followed and enforced by the fact that there is absence of any declaration by any Malaysian court that Chettiar's will is invalid and the Indian court confirming Alagammai's will. As regards the interest of the

four grandchildren of Chettiar, it is for each of them to have filed a caveat as having any interest, if any.

We are also with the learned judicial commissioner in her conclusion on the undersirable effect it would have of prolonging litigation which has the effect of preventing the successful party from extracting the grant of probate especially so when there is no reasonable basis to question the validity of both Chettiar's and Alagammai's wills.

We agree with the learned judicial commissioner for the reasons given above that the application to set aside the first and second caveats be allowed. This being our decision, we find no merit in this appeal and we hereby do dismiss it with costs.

Appeal dismissed.

Reported by David Lai